



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28308/2013

THE IMMIGRATION ACTS

Heard at Field House
11 March 2014

Determination promulgated
31 March 2014

Before

UPPER TRIBUNAL JUDGE KING
UPPER TRIBUNAL JUDGE RINTOUL

Between

J H
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: no appearance

For the Respondent: Ms J Isherwood, Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 12 May 1992 and is a citizen of Pakistan. He appeals, with permission, against the determination of First-tier Tribunal Judge Prior, promulgated on 16 January 2014, dismissing his appeal against the respondent's decision to refuse to vary his leave to remain and to remove him from the United Kingdom.

2. The appellant's case is that he is a gay man and faces persecution on that account if he returns to Pakistan. He did not make a claim for asylum in person, but submitted an application on form FRL (O) stating that he is a gay man; that this is known to his family; that as a result his engagement to this uncle's daughter had been broken off; that his family no longer wishes to have anything to do with him; and, that his relatives threatened his life. He states he would not be safe anywhere in Pakistan and thus he is entitled to discretionary leave to remain as to remove him would be in breach of articles 3 6 and 8 of the Human Rights Convention.
3. The respondent refused the application on the basis that the appellant did not meet the requirements of paragraph 276 ADE of the immigration rules; that despite his claim to be at risk due to his sexual orientation, there were no exceptional circumstances and he could apply for asylum if he has a genuine fear of returning to Pakistan.
4. The appellant appealed to the First-tier Tribunal on the grounds that the decision was unlawful; that the respondent had failed to have regard to articles 2, 3, 6, 8 or 14 of the Human Rights Convention; that articles 2 and 3 are engaged as if returned to Pakistan he will face persecution and the death penalty on account of his sexual orientation; that the respondent had erred in having regard to paragraph 276 ADE of the immigration rule as his application had been made before 9 July 2013; that discretion should have been exercised in his favour.
5. The appellant did not appear at the hearing before the First-tier tribunal on 3 January 2014. Prior to that two applications for an adjournment on the basis of the appellant's ill-health had been made and refused on 27 and 31 December 2013. They were not renewed before Judge Prior, who on the morning of 3 January 2014 was informed that the appellant's representative would be attending the hearing at 2pm. There was no such appearance, and the judge decided to proceed in the absence of the appellant or his representative, noting the history of the adjournment requests and that the appellant had arranged an appointment to claim asylum on 24 January 2014.
6. Judge Prior dismissed the appeal, finding:
 - (i) That the appellant had in his letter provided little detail about the emergence of his homosexuality; had provided no corroborative evidence; and, had failed to explain the delay in making his claim [12]
 - (ii) That the burden was on the appellant to prove his claim on the lower standard of proof and had failed to do so [13]
 - (iii) That the appeal fell to be dismissed on asylum grounds, humanitarian protection grounds, human rights grounds and under the immigration rules.
7. The appellant sought permission to appeal on the grounds that:

- (i) That the judge had erred in not deciding the appeal on its merits and in not applying the relevant law [3];
 - (ii) That the appellant is entitled pursuant to paragraph 339C of the immigration rules to humanitarian protection [3], the judge's approach being fundamentally flawed [4];
 - (iii) That the judge had failed to given the appellant a fair hearing [5];
 - (iv) That the judge's approach to article 3 was unlawful [6]; and he had applied properly to apply HJ (Iran) [7];
 - (v) That the appellant has a well-founded fear of persecution in Pakistan [8];
 - (vi) That the judge failed to consider the appellant's rights under article 8 of the Human Rights Convention [11]-[17]
8. On 31 January 2014 First-tier tribunal Judge Ford granted permission to appeal without specifying that this was on limited grounds. Judge Ford considered that it was arguable that Judge Prior had erred in dismissing the appeal on asylum and human rights grounds when the grounds of appeal mentioned only human rights grounds.

Direction regarding anonymity

9. Although the First-tier Tribunal did not make such an order, we consider that given the nature of the claims put forward by the appellant, and given that he has now made a claim for asylum, that it would be appropriate to make an anonymity order.
10. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings

Proceedings on 10 March 2014

11. There was no appearance by the appellant but there was on file a letter from the appellant's solicitors stating that he wanted the matter to be dealt with on the papers. The letter is accompanied by a skeleton argument; an out patient prescription form and material apparently supportive of the appellant's claim.
12. Ms Isherwood explained that in light of the fact that the appellant had now claimed asylum and that application was under consideration, that the respondent would be withdrawing the underlying decisions to refuse to vary leave to remain and to make removal directions.
13. The effect of the withdrawal of the underlying decision in before the Upper Tribunal is that the Tribunal continues to have jurisdiction under the Tribunals, Courts and

Enforcement Act 2007 to decide whether the determination of the First-tier Tribunal should be set aside for error of law and, if so, to re-make the decision in the appeal, notwithstanding the withdrawal of the appealed decision - see **SM (withdrawal of appealed decision: effect) Pakistan** [2014] UKUT 00064 (IAC).

14. This is a case where the issue of whether the decision of the First-tier Tribunal involved the making of an error of law is still in issue. We have followed the detailed guidance given in **SM** at [66]:

Accordingly, where the Upper Tribunal is considering an appeal against the decision of the First-tier Tribunal, and the decision that triggered the appeal to the First-tier Tribunal is then withdrawn, the Upper Tribunal must proceed pursuant to section 12 of the 2007 Act to decide whether or not the First-tier Tribunal's determination contains an error of law and in doing so, the Upper Tribunal should have regard to the reasons why the respondent has withdrawn her decision. If the First-tier Tribunal did not err in law, then that is the end of the appeal. If the Upper Tribunal finds that the First-tier Tribunal did err in law, then whether it proceeds to the stage of re-making the appeal under section 12(2)(b)(ii) may well depend on the view that the Upper Tribunal takes of whether the re-made appeal would need to be substantively, as opposed to formally, determined, according to the factors we have described above. In this regard, we observe that at the end of its decision in **KF and others**, the Administrative Appeals Chamber found that the First-tier Tribunal had erred in law but decided not to set that Tribunal's decision aside "as that would serve no useful purpose on the particular facts of this case" [62].

15. On the facts of this appeal, we consider that we must first decide whether the decision of First-tier Tribunal Judge Prior involved the making of an error of law.
16. It was open to Judge Prior to proceed to determine the appeal in the appellant's absence, having noted that the medical certificates produced in support of the earlier requests did not adequately explain why the appellant could not attend the hearing. There is still no proper explanation for that, nor has any satisfactory explanation for the representatives' failure to attend been provided. Accordingly, the judge was entitled to proceed to determine the claim on the material before him in the appellant's absence.
17. We find no merit in the submission that the judge erred in considering asylum grounds. The appellant stated in his grounds of appeal that he faces persecution on account of his sexual orientation on return to Pakistan. While the refugee convention is not mentioned, this ground of appeal engages it and it could not seriously be argued that any judge who, faced with the nature of this claim, could have acted lawfully in not considering asylum grounds.
18. The burden of proof was on the appellant to show, in line with **HJ (Iran) & HT (Cameroon)** [2010] UKSC 31, first that he is a gay man, and second, that he faces persecution as a result. The appellant did not attend the hearing to give evidence and had failed properly to explain that. The judge was entitled to find that the very limited material adduced by the appellant was insufficient even on the lower standard of proof to show first that he was gay, or had made out his case that he

faces ill-treatment as a result. Given the brevity of the appellant's account, it was not an error for the judge not to refer expressly to the background material or case law, nor can it properly be argued that the judge failed to bear it in mind.

19. It follows from this that the judge was entitled to dismiss the appeal on asylum grounds, and his reasons, while succinct, are adequate and sustainable. For the same reasons, his findings with respect to humanitarian protection and articles 2 and 3 of the Human Rights Convention are also sustainable and adequate.
20. While the judge made no express findings with respect to article 8 of the Human Rights Convention, the grounds fail to establish any arguable basis, given the dearth of material, on which any judge having properly directed himself as to the law could properly have found in the appellant's favour. The fact that he has lived here for three years, lawfully, and has studied here is wholly insufficient.
21. Accordingly, we consider that the decision of First-tier Tribunal Judge Prior did not involve the making of an error of law.
22. While the underlying decision has been withdrawn, as we have found no error of law, there is no need for us to take further action; had we found any or all of the errors identified, we would not have set the decision aside as there would have been no useful purpose in doing so, given that the appellant's claim for asylum is now under consideration, and any decision to refuse that would attract a fresh right of appeal.

Summary of conclusions and decisions

1. The determination of the First-tier Tribunal did not involve the making of an error of law.
2. The parties are reminded of the anonymity order made

Signed

Date: 28 March 2014

Upper Tribunal Judge Rintoul